IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 3RD AUGUST 2007 / 12TH SRAVANA 1929

CRL.A.No. 644 of 2003()
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(SC.NO.351/99 OF ADDL.DISTRICT & SESSIONS JUDGE FAST TRACK (ADHOC-I)KOZHIKODE)

APPELLANT: ACCUSED:
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SIVADASAN, AGED 40,
S/O. CHEKKINI, PUTHIYOTTIL METHEL HOUSE,
MODAKKALLUR AMSOM AND KOTHANKAL DESOM,
KOYILANDY TALUK, KOZHIKODE DIST.

BY ADV. SRI.VARGHESE C.KURIAKOSE
SRI.SANTHARAM.P

RESPONDENTS: COMPLAINANTS:
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STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR THOMAS JOHN AMBOOKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**K. THANKAPPAN, J.**

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**CRL.A.NO.644 OF 2003-B**

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**Dated this the 3rd day of August, 2007.**

**JUDGMENT**

The appellant, the accused in S.C.No.351/1999 on the file of the Additional District and Sessions Judge Fast Track (Adhoc-I), Kozhikode, faced trial for an offence punishable under Section 55(a) of the Abkari Act on the allegation that he was found in possession of one liter of arrack on 16.8.1997 at a place called Kothankal. To prove the case against the appellant, prosecution examined six witnesses and relied on Exts.P1 to P9. MO1 black cannas was also produced. After closing the prosecution evidence, the appellant was questioned under Section 313 of the Code. He denied the prosecution charge and had stated that he is innocent. The trial court relied on the evidence of Pws 3 to 5, the official witnesses, and Ext.P8 chemical report and found the appellant guilty under Section 55 (a) of the Abkari Act and convicted him thereunder and sentenced to undergo R.I for two years and a fine of Rs.One lakh with default sentence of payment of fine to undergo S.I for a further period of nine months. Benefits under Section 428 of Cr.P.C was also allowed. The judgment of the trial court is challenged in this appeal.

2. This Court heard the learned counsel appearing for the appellant in detail and the Public Prosecutor. The following contentions are taken before this Court for challenging the judgment of the trial court. Firstly, it is contended that finding of the court that the appellant had committed an offence punishable under Section 55(a) of the Abkari Act is not legally sustainable in the light of the judgments reported in **Surendran v. Excise Inspector** (2004 (1) KLT 404) and **Sudephan @ Aniyan v. State of Kerala** (2005 (2) KLD (Crl) 631) as the prosecution failed to prove that the contraband was seized from the appellant in connection with any export, transport or transit of the contraband. Secondly, it is contended by the counsel that evidence of Pws 3 to 5 cannot be accepted for finding the appellant guilty of the offence as the evidence of these official witnesses has not been corroborated with any independent witnesses. Thirdly, it is contended that Pws 3 and 4, the two official witnesses, who detected the crime and investigated the offence did not comply with the provisions of the Abkari Act as they have not given evidence before the court that the contraband and the sample were produced before the court in time and without any unnecessary delay so as to rule out the chances of substitution of the same. Lastly, it is contended that the evidence of Pws 3 and 4 would not

show that they have complied with the provisions regarding seizure of the contraband article , taking of the sample and sealing and labeling of the same as per the procedure prescribed under the provisions of Kerala Excise Manuel as there was no evidence before the court that the contraband and the sample were produced before the court where seal and label were got identified at the place of the seizure. With regard to the first contention, the prosecution case itself is that the appellant was found coming with MO1 cannas along the road when PW3 and other excise officials were on patrol duty on the day of the incident and on seeing the excise party, the appellant wants to hide MO1. However, the appellant was stopped and questioned by PW3 and it was found that the appellant was found in possession of one liter of arrack in a five liter cannas and there was no evidence adduced by the prosecution to prove that the appellant possessed MO1 in connection with any transport or transit of the same. If so, as per the principles laid down by this Court, possession simplicitor of any liquor will not attract Section 55(a) of the Abkari Act as held by this Court in Surendran's case as well as in **Sudephan's case** (cited supra). In the above two judgments, this Court had categorically held that to attract an offence under Section 55 (a) of the Act, the prosecution should allege and establish that

the contraband was found in possession of the accused in connection with any of the Act contemplated under Section 55 (a) of the Act in connection with transport, export, transit etc. There is no evidence adduced to that effect. If so, the finding of the court that the appellant committed the offence under Section 55(a) of the Act is not legally tenable. However, the prosecution case is that the appellant was found in possession of one liter of arrack on the day of the incident and if a person possesses arrack in any form, can be punished under Section 8(1) read with Section 8(2) of the Abkari Act. The prosecution case now tried to prove through the evidence of Pws 3 to 5 is that the appellant was found in possession of MO1 which contained one liter of arrack out of which the sample was also taken and got analysed and as per Ext.P8 chemical report it was reported that the sample contained 38.48% of ethyl alcohol by volume. If so, the prosecution succeeded in proving that the sample analysed was arrack as defined under Section 3 of the Act. The prosecution case before the court was that the appellant was found in possession of MO1 which contained one liter of arrack. The evidence adduced before the court would show that while PW3 along with his excise officials were on patrol duty, they have seen the appellant coming in front of them with MO1 can and on stopping the appellant it was

revealed that MO1 contained arrack. Further, the prosecution allegation is that on preparation of Ext.P2 statement, MO1 was seized from the appellant and sample was taken. This fact is tried to prove the prosecution through the evidence of Pws 3 and 4. The prosecution examined Pws 1 and 2 who were the independent witnesses, alleged to have been present at the time of preparation of Ext.P2 statement and Ext.P1 mahazar. These witnesses turned hostile to the prosecution and have stated that they were not present in the scene. Hence, the court left with the evidence of Pws 3 and 4 alone. PW3 had stated that he had seized MO1 from the appellant and had taken the sample. This witness also had stated that he had registered an occurrence report as O.R.No.88/1997 and this witness has also stated that the appellant was arrested and he was entrusted to the Range Office, Balissery. This witness has further stated that he had seen copy of the occurrence report and other details regarding detection of the crime to the Judicial Magistrate of First Class, Koyilandy as evidenced from Ext.P9. It is seen from the seal of the court in Ext.P9 that occurrence report reached the court only on 19.8.1997. The delay in sending the report to the court is not explained. Apart from the above document, it is come out in evidence that the appellant and the

sample along with the contraband were produced before the Excise Range Office, Balissery and at Balissery a crime was also registered as C.R.No.90/1999 and a further F.I.R was sent to the court on 17.8.1997 which was received by the court on 18.8.1997. These two documents were produced before the court at different times and the delay created a little doubt regarding the action taken by PW3 and also PW4. It is come out in evidence that MO1 and the sample alleged to have been seized from the appellant were produced before the court on 18.8.1997. There is no explanation coming either from PW3 or PW4 for the delay and apart from the delay caused, these two witnesses and PW5 had not offered any evidence to show that the contraband and the sample were kept in safe custody till they were produced before the court and the chance of substitution of the same was not ruled out by proving the evidence before the court that the material objects were kept in safe custody. This shows that the action taken by Pws 3 and 4 is not in accordance with the provisions of the Abkari Act and also not in conformity with the principles laid down by this Court in the judgment reported in **Narayani v. Excise Inspector** (2002 (3) KLT 725). In the above judgment, this Court held that in the absence of any evidence to prove that residue and the sample were kept in proper custody till

the date of producing the same before the court to rule out the chances of tampering the same. Apart from this infirmity, it is come out in evidence that either PW3 or PW4 had given evidence before the court that the sample alleged to have been taken from the appellant was properly sealed or labeled and got the signature of the appellant or the witnesses present. In this context, PW3 and PW4 had even got doubt regarding the nature of the seal which they alleged to have been put on the sample and the contraband. All these facts and circumstances, create reasonable doubt on the evidence of Pws 3 and 4 to show that the contraband was seized from the appellant as alleged in the prosecution case. The benefit of such reasonable doubt has to be given to the appellant. If so, this Court is inclined to set aside the finding entered by the trial court that the prosecution had succeeded in proving that the appellant was found in possession of MO1 cannas which contained one liter of arrack. Apart from this, this Court to see that though the appellant had denied the prosecution case when he was examined under Section 313, the trial court had not put the contents of Ext.P8 chemical report to him and that report shows that the sample analysed was arrack. The only question put to him is that

He answered . The accused has got a right to get clear the evidence regarding the circumstances proved against him by the prosecution when he was questioned under Section 313. If such a right is infringed, the prosecution could not succeed to prove the case against such accused.

In the light of the discussions made in this judgment, this Court is of the view that the appellant is entitled for acquittal of the charge. Hence, judgment of the trial court is set aside and the appellant is acquitted and the appeal is allowed accordingly. The bail bond of the appellant stands canceled. It is also made clear that if any amount has been remitted by way of fine by the appellant, that amount shall be returned to him as per law.

**K. THANKAPPAN, JUDGE.**

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**K. THANKAPPAN, J.**

**CRL.A.NO.644 OF 2003-B**

**JUDGMENT**

**3rd day of August, 2007.**